Petition

81-353

No. _____

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

HUBERT RICHARD SPRADLING

and

RONALD DALE DUNN *Petitioners*

vs.

STATE OF TEXAS *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

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ATTORNEY FOR PETITIONERS

QUESTIONS PRESENTED

The Texas Court of Criminal Appeals has denied an Application for Writ of Prohibition raising a Plea of Double Jeopardy concerning two cases where (a) trial resulted in a conviction and (b) trial resulted in acquittal. The questions presented are:

1. Whether a defendant must undergo a second trial in order for an appellate court to consider a claim of double jeopardy where: (a) there has been a prior conviction, or (b) there has been a prior acquittal.

2. Where there is a crime simultaneously involving two or more victims, is it a violation of the Double Jeopardy Clause of the Fifth Amendment to have a separate trial for each victim where there has already been a trial for one victim involving the same evidence, witnesses, and defendant, and such trial resulted in conviction?

3. Whether it is a violation of the Double Jeopardy Clause of the Fifth Amendment to have a second trial, following an acquittal

where the second trial involves evidence obtained from a single search, and such second trial involves the same evidence, the same witnesses, and the same defendant.

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

October Term, 1980

* * *

HUBERT RICHARD SPRADLING

and

RONALD DALE DUNN Petitioners

VS.

STATE OF TEXAS

Respondent

* * *

ON APPEAL FROM THE SUPREME COURT OF TEXAS

* * *

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PETITIONERS

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OPINION BELOW

The Texas Court of Criminal Appeals summarily denied Motions for Leave to File and Petitions for Writs of Prohibition. There is therefore no written opinion.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on June 8, 1981 denying petitioners' pretrial Application for Writ of Prohibition raising a plea of former jeopardy. A timely Motion to Reconsider the refusal to grant Petitioner's Application for Writ of Prohibition was denied on June 22, 1981, and this petition for certiorari was filed within sixty (60) days of that date. This court's jurisdiction is invoked under 28 USC §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

USC Constitution, Amendment 5 (Double Jeopardy Clause)

> ...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ...

STATEMENT OF THE CASE

This petition for Writ of Certiorari: concerns two separate cases: (1) The State of Texas vs. Hubert Richard Spradling, cause number D-10,492, and (2) The State of Texas vs. Ronald Dale Dunn, Cause Number 36,634. These cases involve closely related questions and are consolidated for review on certiorari, pursuant to U.S.C. Rules of Court, Supreme Court, Rule 19.4.

The first case, State of Texas vs. Hubert Richard Spradling, involved two females, Vicki Rash Norvell and Bobby Folks Rash who were struck by an automobile in Orange, Texas, on September 4, 1980. Both girls died as a result of such incident. On October 1, 1980, in the District Court of Orange, Texas, two indictments, D-10,492, D10,495, were presented and filed in such court. These two indictments alleged that Hubert Richard Spradling committed the offense of failure to stop and render aid. Word for word the indictments

are identical except that one alleges failure to stop and render aid to Vicki Rash Norvell, and the other alleges failure to stop and render aid to Bobby Folks Fash.

Trial was had before a jury on February 16, 1981, under cause number D-10,492 with the indictment naming Vicki Rash Norvell. The Petitioner, Spradling, pleaded not guilty and was convicted and sentenced to five (5) years confinement in the penitentiary and a fine of Five Thousand ($5,000.00) Dollar was assessed against him. Upon recommendation of the jury, prison confinement was probated. Now, petitioner is due to be again tried by the State under the indictment naming Bobby Folks Rash, D-10,495.

In the second case, The State of Texas vs. Ronald Dale Dunn, was indicted on May 19, 1979, in the 23rd District Court of Brazoria County, Texas for knowingly and intentionally possessing and manufacturing a controlled substance, namely amphetimine. On April 14, 1980, petitioner, Ronald Dale Dunn, was tried

before a jury on such charge. At the close of the State's case, petitioner moved for an instructed verdict. Motion for Instructed Verdict was granted, the Court discharged the jury and found the Petitioner not guilty of the offenses charged in the indictment. The State of Texas now seeks to prosecute Ronald Dale Dunn for possession of marijuana. Such marijuana was recovered as a result of the same search which led to the prior indictment of possession and manufacture of a controlled substance for which offense petitioner has been acquitted.

In both cases, a timely pretrial Plea in Bar was filed with the trial court asserting that a second trial would be in violation of the Double Jeopardy clause of the Fifth Amendment. On June 10, 1981, in the case of The State of Texas vs. Hubert Richard Spradling the trial court heard and denied petitioner's plea in bar. On April 21, 1981, in the case of The State of Texas vs. Ronald Dale Dunn, the trial court denied Ronald Dunn's plea in

bar.

Upon such denial of petitioners' pleas in bar, applications and petitions for Writs of Prohibition were filed with the Texas Court of Criminal Appeals. Leave to file application for Writs of Prohibition were in each case summarily denied. In Spradling such application and petition for Writ of Prohibition, Writ Number 10438, was denied on June 16, 1981. The Texas Court of Criminal Appeals denied the application and petition for Writ of Prohibition in the Dunn case, Writ Number 10,396, on June 8, 1981.

Thereafter, in both instances a Motion to Reconsider the petition for a Writ of Prohibition was filed with the Texas Court of Criminal Appeals. The Court of Criminal Appeals denied the motion to Reconsider in the Spradling case on July 6, 1981. On June 22, 1981, the Court denied petitioner's Motion to Reconsider in the Dunn case.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. THE STATE OF TEXAS IS IN CONFLICT WITH DECISIONS OF THIS COURT BY ITS REFUSAL TO RECOGNIZE A CLAIM OF FORMER JEOPARDY BEFORE THERE HAS BEEN A SECOND TRIAL.

The State of Texas demonstrates no hesitancy in granting a writ of habeas corpus challenging a conviction on grounds of jeopardy. This same court refuses to entertain any extra-ordinary relief prior to conviction. There is a need for procedures in the State of Texas to protect the rights guaranteed under the Constitution of the United States to every citizen. The Court of Criminal Appeals for the State of Texas espouses the same theories that the Supreme Court of the United States does with relation to jeopardy. In a case decided a week before applicant Dunn's leave to file an application for Writ of Prohibition the Court of Criminal Appeals in Texas, in the case styled Ex Parte Larry Michael Myers, No. 67,541 decided June 17, 1981, "As this Court perceived it in Ex Parte Reynolds 588 SW2d 900 (1979) supra, at

903, jeopardy decisions are squarely directed to the prevention of the second trial's taking place". The language of the Meyers case is almost identical to the language in Abney v. United States, 431 US 651 (1977), yet a defendant in Texas is not afforded the safeguards provided by Abney. In Texas a defendant must undergo a second trial to assert a claim of former jeopardy. This, however, is precisely what the jeopardy clause is designed to protect against, namely a second trial. The whole safeguard of the double jeopardy clause is rendered meaningless if a defendant is subjected to the embarassment, expense and ordeal of a second trial, and compelled to live in a continual state of anxiety and insecurity, and suffer the possibility that even though innocent, he may be found guilty. Green v. U.S., 355 U.S. 184 (1957).

2. THE TEXAS COURT OF CRIMINAL APPEALS BY ITS DECISION BELOW HAS ERRONEOUSLY GIVEN ITS APPROVAL TO A SECOND TRIAL FOLLOWING A CONVICTION ON THE SAME OFFENSE.

The second reason why Writ of Certiorari should issue is to add clarity to the phrase, "same offense". In Spradling case two girls were simultaneously hit by an automobile and died as a result. Petitioner Spradling was twice indicted by the grand jury; one indictment alleged failure to stop and render aid to Vicki Rash Norvell, cause number D-10,492, the other indictment alleged failure to stop and render aid to Bobby Folks Rash, cause number D-10,495. A single phone call summoning assistance would have relieved Petitioner of liability for both girls.

Trial was had before a jury under the indictment numbered D-10,492, naming Vicki Rash Norvell. In this trial both deaths were discussed in evidence and considered by the jury. The jury convicted Spradling for failure to stop and render aid. The sentence was five years probation and a Five Thousand ($5,000.00) Dollar fine.

A second trial is pending in which the State is seeking to retry Spradling under the

ndictment naming Bobby Folks Rash, cause number D-10,495. The same witnesses will be called to testify, the same evidence will be received.

Hence, at the heart of this question for consideration is this question: Where there is one criminal event involving two or more victims can the frequency of prosecution be governed simply by the number of victims? The cases of Ashe v. Swenson, 397 US 436 (1970), and Harris v. Washington, 404 US 55 (1971), hold to the contrary.

3. THE STATE OF TEXAS SHOULD BE COLLATERALLY ESTOPPED FROM REPEATEDLY TRYING A DEFENDANT ON EVIDENCE PRODUCED FROM A SINGLE SEARCH.

The final question presented for certiorari is whether the State may reprosecute a defendant following an acquittal. In petitioner Dunn's case a search was made of Dunn's residence where marijuana and amphetamines were allegedly recovered. In The State of Texas v. Ronald Dale Dunn, cause number 36,634, the indictment charged petitioner Dunn only

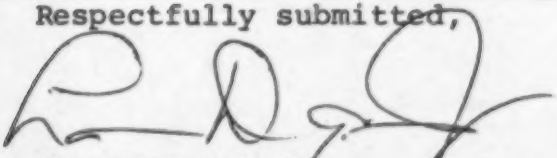
with the offense of possessing and manufacturing amphetimines. After the prosecution rested, the court granted a Motion for Instructed Verdict because of significant variance between the pleading and proof.

Petitioner Dunn has since been reindicted for the offense of possession of marijuana. Petitioner asserts that the State must be collaterally estopped to prosecute under this offense because the amphetamines and marijuana were recovered as a result of a single search. During trial evidence as to both the amphetamines and the marijuana was introduced. Should a second trial be allowed, as in petitioner Spradling's case, the same witnesses will be called to testify, the same evidence introduced.

The prosecution in the Dunn case has once carved out a single offense against petitioner Dunn. Simply because it was unsuccessful in obtaining a conviction, the

State of Texas with all its vast resources, ought not be given license to make repeated attempts until successful. The Fifth amendment is a shield against such practice.

Respectfully submitted,



LOUIS DUGAS, JR.
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Orange, Texas 77630
713/883-3506
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WRIT NO. 10,396

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

RONALD DALE DUNN

v. --- Application for Writ of Prohibition

HONORABLE TOM KENYON, Judge, 300th District Court of Brazoria County

and

HONORABLE JIM M. MAPEL, Criminal District Attorney, Brazoria County

ORDER

On this day came to be considered an original Application for Writ of Prohibition presented to this Court by petitioner and arising out of cause nos. 11,926, and 11,927 on the docket of the 300th District Court of Brazoria County. Said Application was accompanied by a Motion for Leave to File same and the Court is of the opinion that leave to file said Application should be denied.

Therefore, it is ORDERED, ADJUDGED and DECREED by the Court of Criminal Appeals that leave to file said Application for Writ of

Prohibition be, and it is hereby, in all thing things denied.

IT IS SO ORDERED this 8th day of June, 1981.

PER CURIAM

En banc

Clinton and Teague, JJ., dissent

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

HUBERT RICHARD SPRADLING,	X	
	X	
Petitioner	X	
v.	X	Application
	X	for Writ of
DONNIE RAY BURGESS, JUDGE,	X	Prohibition
260TH DISTRICT COURT,	X	from ORANGE
ORANGE COUNTY,	X	County, Texas
	X	
and	X	
	X	
WILLIAM C. WRIGHT, COUNTY	X	
ATTORNEY, ORANGE COUNTY,	X	
	X	
Respondents.	X	

ORDER

On this day came to be considered petitioner's original Application for Writ of Prohibition arising out of cause number D-10,495 in the 260th District Court of Orange County and the Court is of the opinion that leave to file such application should be denied.

It is therefore ORDERED, ADJUDGED and DECREED that Leave to File said original Application for Writ of Prohibition be, and it is hereby, in all things denied.

It is so ordered this 16th day of June, 1981.

PER CURIAM

En Banc

Clinton and Teague, J. J. dissent.

COURT OF CRIMINAL APPEALS

STATE OF TEXAS
BOX 12308
CAPITOL STATION
AUSTIN 78711

Mr. Louis Dugas, Jr.
Attorney at Law
1804 North 16th Street
Orange, Texas 77630

RE: Ronald Dale Dunn v.
Honorable Kenyon and Mapel,
DA;
Our Writ No. 10,396

Dear Mr. Dugas:

Please be advised that the Court has, this date, denied your motion to reconsider the refusal to allow leave to file petitioner's application for writ of prohibition.

If you have any questions, please feel free to contact me.

Sincerely yours,

Walter C. Prentice
Senior Administrative Assistant To
The Court

WCP:bg

cc: The Honorable Tom Kenyon
Judge Presiding
300th Judicial District Court
Brazoria County Courthouse
Angleton, TX 77515

Mr. Jim M. Mapel
Criminal District Attorney
Brazoria County Courthouse
Angelton, TX 77515

Mrs. Frances Bennett
Brazoria County District Clerk
Brazoria County Courthouse
Angleton, TX 77515

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

HUBERT RICHARD SPRADLING, Petitioner	X	
VS.	X	
DONNIE RAY BURGESS, JUDGE, 260TH DISTIRCT COURT, ORANGE COUNTY,	X	NO. 10438
and	X	
WILLIAM C. WRIGHT, COUNTY ATTORNEY, ORANGE COUNTY	X	

MOTION TO RECONSIDER

COMES NOW the Petitioner, HUBERT RICHARD SPRADLING, and moves the court to reconsider the refusal to allow leave to file petitioner's application for writ of prohibition for the following reasons:

1. Texas has no guidelines in situations such as this. There are many statutes giving the defendant this right but there is no vehicle outside of direct appeal or writ of habeas corpus to test the sufficiency of a Plea of Double Jeopardy. By either of these methods, the defendant's right has already been disregarded. This honorable court can

give the courts of Texas, the lawyers of Texas, and the prosecutors of Texas the parameters where this plea could be heard and disposed of at the trial level.

2. By granting petitioner's motion the Court will make a giant step in minimizing the harassing exposure to the harrowing experience of a criminal trial.

3. The Supreme Court of the United States speaking through Justice Black in the case of Green v. U.S. 355 US 184 (1957);

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. ID. at 187-88."

In Abney v. U.S. 431 US 651, Chief Justice Burger said in note 11 on page 661:

> "Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is

> acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs."

In the case of Harris v. Washington 404 US 55 (1971), the Supreme Court of the United States held that the procedure followed by petition is proper to determine the question of whether the Constitution forbids a second trial and said there:

> "(1) Since the state courts have finally rejected a claim that the Constitution forbids a second trial of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be convicted of the crimes with which he is charged, our jurisdiction is properly invoked under 28 USC §1257."

Petitioner submits that this court should reconsider its refusal to allow petitioner leave to file his Application for Writ of Prohibition and grant petitioner leave to file his application for Writ of Prohibition.

Respectfully submitted,

s/ Louis Dugas, Jr.
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713/883-3506

Bar Card No. 06173000

7-6-81

Denied

John F. Onion, Jr.
Presiding Judge

A True Copy
Attest:
Thomas Lowe, Clerk
Court of Criminal Appeals
of Texas

By: Sherrie Ericson
Deputy

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

October Term, 1980

* * *

NO. _____

* * *

HUBERT RICHARD SPRADLING
AND
RONALD DALE DUNN,

Petitioners

VS.

STATE OF TEXAS,

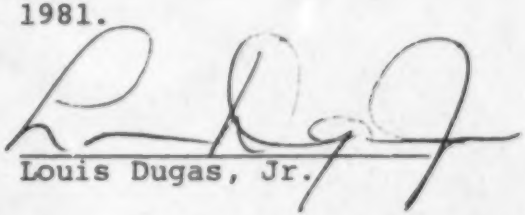
Respondent

* * *

CERTIFICATE OF SERVICE

LOUIS DUGAS, JR., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for HUBERT RICHARD SPRADLING and RONALD DALE DUNN, Petitioners in the above matter; and that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the

Respondent, the Honorable William C. Wright, County Attorney, Orange County Courthouse, Orange, Texas 77630, and the Honorable Jim Maples, District Attorney, Brazoria County Courthouse, Angleton, Texas, 77515, by mail, postage prepaid, on this the 19th day of August, 1981.



Louis Dugas, Jr.

Opposition

1

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NO. 81-353

IN THE

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OCTOBER TERM 1980

RONALD DALE DUNN
Petitioner

vs.

STATE OF TEXAS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 81-353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

RONALD DALE DUNN
Petitioner

vs.

STATE OF TEXAS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent opposes the petition for writ of certiorari on the following grounds:

THERE IS NO FINAL JUDGMENT OR DECREE RENDERED BY THE HIGHEST COURT OF THE STATE OF TEXAS TO BE REVIEWED BY THIS COURT.

Under 28 USC § 1257 (3) the writ of certiorari should only be granted to review a final judgment or decree rendered by the highest Court of the State. This provision has not been satisfied in the instant case because the Texas Court of Criminal Appeals has not issued a final judgment or decree on the question presented. The record shows that the Petitioner simply presented an Application to File Writ of Prohibition, which application was denied by the Court of Criminal Appeals. Therefore, at the present time this double jeopardy point has not been presented to the Texas Court of Criminal Appeals sufficiently to obtain a decision on the double jeopardy question.

The situation presented for review in the instant case is analagous to that presented in the case of Street vs. New York, 394 U.S. 576 (1969) where this court held that the highest state court had failed to pass upon a federal question, it will be assumed that the omission was due to want of a proper presentation in

the state court unless the aggrieved party can affirmatively show the contrary. The situation presented is distinguishable from that in Harris vs. Washington, 404 U.S. 55 (1971) in which the Court stated that a writ of prohibition was the proper way to present this matter to the Court. In the Harris case, the Washington appellate court issued a decision on its failure to grant the Writ of Prohibition, specifically addressing the double jeopardy question therein. The Court stated that it was dealing with a situation in which the state court had finally rejected the double jeopardy claim.

THE PETITION SHOULD BE DENIED UNDER RULE 19-1(a) OF THE RULES OF THE SUPREME COURT AS NO FEDERAL QUESTION IS INVOLVED.

The Court should refuse to exercise its discretion to grant the writ of certiorari herein under Rule 19-1(a) of its rules as no federal question is presented. This is a case dealing with a state procedural issue, not a

question of constitutional law. The instant case is similar to that in Duncan vs. Tennessee, 405 U.S. 127 (1972), in which the Court withdrew its previous grant of a petition for writ of certiorari. In the Duncan case the petitioner claimed his rights under the double jeopardy clause had been violated by his reindictment and trial after a directed verdict of acquittal. The acquittal was entered because the indictment was defective under Tennessee law. The Court rules that the writ had been improvidently granted since the questions raised by the petitioner were so interrelated with Tennessee's rules of criminal pleading.

The situation presented in the instant case is almost identical to that in Duncan. Here the Judge discharged the jury and directed a verdict of acquittal because the indictment charging possession of a controlled substance and manufacture of a controlled substance misspelled the Key word, "amphetamine" (spelled in the

indictment "amphetimine"). Under Texas law it is not an offense to possess or manufacture "amphetimine", therefore the petitioner had not been charged with an offense at all.

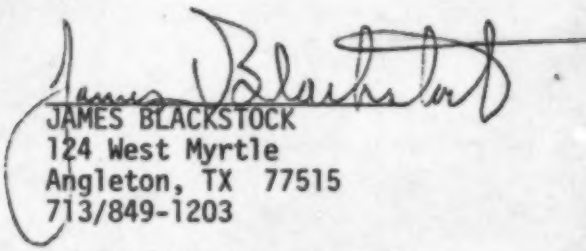
In accordance with Article 36.11 of the Code of Criminal Procedure of the State of Texas, the trial judge simply followed the procedure outlined by discharging the jury and acquitting the defendant. The article also provides that such a proceeding will not act as a bar to a future proceeding which sufficiently charges an offense. Further applying Texas law, jeopardy only attaches upon a good and sufficient accusatory pleading. McAfee vs. State, 363 SW2d 941 (Texas Criminal Appeals 1963); Smotherman vs. State, 415 SW2d 430 (Texas Criminal Appeals 1967). This is in accord with the view expressed in Illinois vs. Somerville, 410 U.S. 458 (1973).

CONCLUSION

The petition for writ of certiorari should be denied because there is no final judgment of

the State of Texas for review and because no federal question is presented for review.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

Opposition

2

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NO. 81-353

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1981

HUBERT RICHARD SPRADLING,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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GILBERT J. PENA
Assistant Attorney General
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First Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD REVIEW A TEXAS CRIMINAL DEFENDANT'S COMPLAINT THAT STATE PROCEDURES DO NOT AFFORD HIM PRETRIAL REVIEW OF A DOUBLE JEOPARDY CLAIM THAT IS ON ITS FACE FRIVOLOUS.

II. WHETHER PETITIONER'S TRIAL AND CONVICTION FOR FAILURE TO STOP AND RENDER AID TO ONE VICTIM BARS HIS TRIAL FOR COMMISSION OF THE SAME OFFENSE AGAINST ANOTHER VICTIM.

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NO. 81-353

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

HUBERT RICHARD SPRADLING,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari submits this brief in opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals denying Petitioner leave to file an application for writ of prohibition is attached to the petition as an appendix at page A3.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claims are based on the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's statement of the case.

SUMMARY OF ARGUMENT

There are no important or substantial reasons to consider the questions presented.

There is no constitutional right to pre-trial review of a contention that a second trial will violate the constitutional proscription against double jeopardy. Particularly is this so where, as here, the double jeopardy claim is on its face devoid of merit. Further, this Court should decline to review Petitioner's contention because he has an alternate remedy in federal habeas corpus.

ARGUMENT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Peti-

tioner has advanced no special or important reasons, and none exists.

II. THERE IS NO CONSTITUTIONAL RIGHT TO PRE-TRIAL REVIEW OF A DOUBLE JEOPARDY CLAIM, PARTICULARLY ONE THAT IS PATENTLY FRIVOLOUS.

Petitioner attacks the Texas statutory provisions for review of claims of former jeopardy on the ground that they do not comport with the procedure mandated in federal courts by *Abney v. United States*, 431 U.S. 651 (1977). In *Abney*, this Court exercised its supervisory powers over federal criminal prosecutions and held that a pre-trial order denying a motion to dismiss on double jeopardy grounds is an appealable "final decision" under 28 U.S.C. §1291 and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). 431 U.S. at 662. Petitioner, in seeking to elevate this procedural mechanism to constitutional status, would have this Court sit as a "super legislature" and formulate rules of procedure for state prosecutions. Such an undertaking not only offends traditional notions of comity and federalism, but is also particularly inappropriate where, as here, the double jeopardy claim is on its face frivolous.

In *Abney*, this Court adverted to the potential problem posed by its holding:

> Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the Courts of Appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

431 U.S. at 662 n.8. Just as the Court foresaw, several of the courts of appeals have been forced to devise means to deal with frivolous interlocutory appeals on double jeopardy grounds. The Fifth Circuit has held that when the district court denies a frivolous and dilatory motion to dismiss on double jeopardy grounds, it retains jurisdiction to commence trial pending appeal of the denial of the motion to dismiss. *United States v. Dunbar,* 611 F.2d 985, 988-89 (5th Cir.), *cert. dendied,* 447 U.S. 926 (1980). The Fourth Circuit has held that the denial of a frivolous double jeopardy claim is an interlocutory order and not appealable as an exception to the final order rule of 28 U.S.C. §1291. *United States v. Ellis,* 646 F.2d 132, 134 (4th Cir. 1981). *See also, United States v. Leppo,* 641 F.2d 149, 151 n.3 (3rd Cir. 1980); *United States v. Burt,* 619 F.2d 831, 838 & n.10 (9th Cir. 1980). The rule in *Abney* has been thus qualified because "[d]efendants cannot be allowed to delay trials and to dislocate the orderly procedure of the courts simply by raising frivolous claims of double jeopardy." *United States v. Ellis,* 646 F.2d at 134.

III. PETITIONER'S DOUBLE JEOPARDY CLAIM IS ON ITS FACE DEVOID OF MERIT.

Petitoner's double jeopardy contention is precisely the sort of claim that precipitated the above holdings of the Courts of Appeals. Petitioner was tried and convicted in Cause No. D-10,492 in the district court of Orange County, Texas, of the offense of failure to stop and render aid to Vicki Rash Norvell on or about September 4, 1980. Petitioner seeks to bar his trial in Cause No. 10,495 for failure to stop and render aid to Bobby Folks Rash on or about September 4, 1980. He argues that the second trial will subject him to double jeopardy because "[a] single phone call summoning assistance would have relieved Petitioner of liability for both girls" (Petition at 8) and because "[t]he same

witnesses will be called to testify, the same evidence will be received" (Petition at 9).

Similar arguments have been consistently rejected by this Court. In order to determine whether two offenses are "the same" for double jeopardy purposes, each offense must be examined to ascertain "whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 384 U.S. 299, 304 (1932); *Illinois v. Vitale*, 447 U.S. 410 (1980); *Brown v. Ohio*, 432 U.S. 161, 168 (1977); *Jeffers v. United States*, 432 U.S. 137, 151 (1977). Under the *Blockburger* test, it is possible for a single criminal act or conspiracy to give rise to multiple separate offenses. *See, Gore v. United States*, 357 U.S. 386 (1958). A defendant is not placed in double jeopardy when the same witnesses testify in the second trial and much of the same evidence is introduced. *E.g., Iannelli v. United States*, 420 U.S. 770 (1975); *Pereira v. United States*, 347 U.S. 1 (1954). Petitioner's reliance on *Ashe v. Swenson*, 397 U.S. 436 (1970) and *Harris v. Washington*, 404 U.S. 55 (1971) is grievously misplaced. Those cases hold only that a second trial is constitutionally impermissible when a criminal defendant has been *acquitted* of the same offense arising out of the same criminal transaction but involving a different victim.

IV. THIS COURT SHOULD DECLINE TO REVIEW PETITIONER'S CLAIMS BECAUSE HE HAS AN ALTERNATIVE REMEDY IN FEDERAL HABEAS CORPUS.

Petitioner asks this Court to grant the writ because Texas procedures do not provide for pre-trial review of a double jeopardy claim. Petitioner ignores, however, the holdings of two United States Courts of Appeals that federal corpus is a proper means for insuring compliance

with *Abney. See, Baker v. Metcalfe,* 633 F.2d 1198, 1200 n.3 (5th Cir. 1981); *United States ex rel. Stewart v. Hewitt,* 517 F.2d 993 (3rd Cir. 1975); *United States ex rel. Webb v. Court of Common Pleas,* 516 F.2d 1034 (3rd Cir. 1975). Because Petitioner has failed to take advantage of this alternate remedy, this Court should decline to exercise its jurisdiction.

CONCLUSION

For the above reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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